IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-820

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Pascual Guana-Sanchez, moves the Court for an Order permitting him to proceed in this Court in forma pauperis, pursuant to the provisions of Title 28 United States Code, Section 1915, and Rule 53 of this Court, and in support thereof states the following:

1. Respondent has filed a financial affidavit on Criminal Justice Act Form 23 in the United States District Court for the Northern District of Illinois.

2. Joseph Beeler, Esquire has been Respondent's court appointed counsel throughout the proceedings below, and has been appointed by the United States Court of Appeals for the 7th Circuit to represent Respondent in the preparation of Respondent's Memorandum in Opposition to the Petition for a Writ of Certiorari.

3. Joseph Beeler, Esquire, is not in Chicago, and is not available to sign this Motion.

WHEREFORE, Respondent prays that he may have leave to proceed in this Court in forma pauperis.

Donald J. Martin,
Attorney for Respondent
512-14 Swede Street
Norristown, Pennsylvania 19401

COMMONWEALTH OF PENNSYLVANIA
: ss
COUNTY OF MONTGOMERY

DONALD J. MARTIN, being duly sworn according to law, deposes and says that he is an attorney for the Respondent, and has assisted in the representation of Respondent in the courts below as a Federal Defender Program Law Student Intern, and that the facts set forth in the foregoing Motion are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed
before me this 25th day
of January, 1974.

Donald J. Martin

ANN [illegible]
Notary Public, Montgomery Co., Pa.
My Commission Expires March 24, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

PASCUAL GUANA-SANCHEZ

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH BEELER,
c/o Federal Defender Program, Inc.
219 South Dearborn Street
Chicago, Illinois 60604

DONALD J. MARTIN
512 Swede Street
Norristown, Pennsylvania 19401

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MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is reported at 484 F. 2d 590.

STATEMENT OF THE CASE

1. The statement of this case as set forth in the Government's Petition for a Writ of Certiorari contains significant omissions and misinterpretations of fact, so it is necessary for Respondent to set out a complete statement of this case. The relevant facts, as developed in the hearing on the Motion to Suppress, the opinion of the District Court and the opinion of the Court of Appeals are as follows:

Pascual Guana-Sanchez (hereinafter referred to as "Respondent") is charged with knowingly and unlawfully transporting three Mexican aliens within the United States (only "within" the United States, and not "into" as the Government declares, Pet. at 3[1]), knowing or having reason to believe that the aliens had made their last entry into the United States within the last three years, in violation of the Immigration

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1 The Government's Petition for a Writ of Certiorari is cited as "Pet."

and Naturalization Laws of the United States. 8 U.S.C. §1324(a)(2). The detention and subsequent arrest of Respondent occurred on November 17, 1971, and he was indicted by the January, 1972 Grand Jury. Respondent timely moved to suppress evidence obtained as a result of unlawful police conduct; an evidentiary hearing was held on May 12, 1972; and, on June 8, 1972, the District Court ruled. After considering the evidence and the Briefs of the parties, the District Court delivered an oral opinion which is set out as Exhibit "D" in the Government's Petition, and entered an order granting the Respondent's motion. On June 23, 1972, the Government filed its Notice of Appeal, under 18 U.S.C. §3731. The case was not argued before the Court of Appeals until January 23, 1973. That Court issued its opinion on July 18, 1973, and denied the Government's Petition for a rehearing on August 6, 1973. The Government's Petition for a Writ of Certiorari was filed in this Court more than two years after the incident in question.

At the outset of the hearing in the District Court, the parties stipulated that the police officers had acted without a warrant for arrest and search and knew of no such warrant. The only witness called was Officer Pat W. Tenuto of the Villa Park Police Force. At the conclusion of Tenuto's testimony, it was asserted that the testimony of his partner, Officer Norman Hall, would be substantially similar to the testimony already received, and both parties rested.

At approximately 2:30 a.m. on November 17, 1971, Officer Tenuto and his partner, Hall, on routine traffic and patrol duty, were running radar and had made a traffic stop at the intersection of North and Addison Roads in Villa Park.

One of the officers then observed a station wagon parked in a curbed, but unpaved, cut-off connecting the two streets on the northeast corner of the intersection. The headlights and interior dome lights were lit and the officers could see three or four persons inside. The driver, later identified as the Respondent Pascual Sanchez, was studying what appeared to the officer to be a road map.

The officers believed that the driver was lost, radioed a message to the police station that they were going to the aid of a motorist in distress, and gave the dispatcher the Illinois license number of the stationwagon after driving to the other side of the intersection. They pulled their marked patrol car near the stationwagon, got out of the car and approached Respondent's vehicle. Officer Hall proceeded to the driver's side and Officer Tenuto to the passenger's side. Both officers were in uniform, each had a pistol, handcuffs, extra ammunition and a can of Mace on his belt, in full view.

Officer Hall asked Respondent if he was having trouble, and was told that he was looking for a restaurant on North Avenue which was owned by a friend. If this could not be located, then he was looking for another restaurant, and displayed a match book advertising a restaurant in an adjacent town. One of the officers returned to the squad car to find out for Sanchez if the restaurant was open. It was not, and an inquiry of some neighboring towns revealed no other available restaurants open at that time.[2]

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2 The dissenting judge in the Court of Appeals has accepted the Government's assertion that Respondent's story did not check out. 484 F. 2d at 593, Pet. at 6a. This is not a fact found by the District Court, and the police officer never testified that his suspicions were aroused. The Government's conclusion, taken in its most favorable light, is second-guessing at best and it does not necessarily follow that if the restaurant was closed, Respondent was being dishonest when he said he was looking for it.

The officer returned with this information, and then Hall requested Respondent to produce identification. He complied by handing the policeman his driver's license. It appeared to be an entirely valid Illinois driver's license, and furthermore, Respondent's name and address on the driver's license corresponded to information that the officers had just previously received as a result of a radio check of the Illinois license plate of his car. The radio report verified the name and address of the owner, and that the car was not reported as stolen or wanted in connection with any crime. Having completed his inspection of the driver's license, Officer Hall returned it. At this juncture (and even later), the officers admittedly knew of no felonies which the occupants of the car had committed and had no charges to bring against Respondent. The District Court specifically found that "...at this point there were no grounds stated to infer that a crime was being committed, had been committed, or was about to be committed". (Pet. at 17a) Nevertheless, according to Officer Tenuto's testimony, if Respondent had driven away immediately after the license had been returned to him, the officers would have gotten into their car to pursue and detain him again.

Despite the satisfactory driver's license and license plates, Officer Hall continued the questioning and demanded some form of tangible identification from the three passengers. Officer Tenuto's testimony revealed that it was the standard operating procedure of the Villa Park Police to request identification from all persons in a parked vehicle at night, and, moreover, if they were unable to produce satisfactory proof of identity, to bring them to the police station so that their identity could be verified and determined whether they might be "criminals".

After the Respondent translated this request, one of the passengers produced a card written in a foreign language and handed it to Tenuto. The two passengers in the rear seat were not able to produce any identification. Consequently, the officers radioed their sergeant who was in another Villa Park police car and he drove to the scene. After consultation with their sergeant, Respondent and his passengers were taken to the police station.

When they arrived at the police station, they were brought inside. This was followed by a telephone conversation with an officer of the Immigration and Naturalization Service in Chicago. The Immigration Officer on duty spoke with the three passengers and then told the Villa Park police that the passengers were probably aliens illegally within the United States. He requested that they and Respondent be held until officers of the Immigration and Naturalization Service could come to Villa Park the next morning.

2. The District Court delivered an oral opinion on June 8, 1972, in which it held that once the police officer returned the driver's license to Respondent no grounds had been stated to infer that a crime had been, was being, or was about to be committed. As the District Court stated:

> "Whatever proper investigative suspicions they may have had earlier were dispelled at this point, and thus it was unjustified to hold the vehicle any longer, or its occupants, or to interrogate the passengers." Pet. at 19a.

The Seventh Circuit did not focus clearly on the point in time at which it considered the Fourth Amendment intrusion to have occurred, but it specifically referred to this finding, stating that:

> "Three steps can be delineated from the facts before us: (1) the original interrogation ending with the determination of the

> validity of Sanchez's driver's license and his ownership of the car; (2) the period beginning with the return to Sanchez of his license and of the restraint upon his movement thereafter; and, (3) the period beginning with the trip to the police station.
>
> . . . After the hearing, the district judge read his findings of fact and conclusions of law in which he decided that the police officers had a reasonable suspicion justifying their interrogation, in the first step of the police activity, but there was no probable cause to justify their activity thereafters." [Footnote omitted] 484 F. 2d at 591, pet. at 2a-3a.

Nowhere did the Court of Appeals disagree with this finding.

REASONS FOR DENYING THE WRIT

The Government has attempted to make this case something which it is not. The Government's Petition states at page 5 that the majority of the Court below determined that the interrogation of the passengers while in Respondent's automobile was proper. The majority opinion (Petition at 3a, 484 F. 2d at 591) states that the District Judge properly decided that the police officers had a reasonable suspicion justifying their initial interrogation, but that there was no probable cause to justify their activities thereafter. The Court of Appeals never stated that the interrogation of the passengers was proper.

The Government is creating semantic confusion in its attempt to frame an issue. It speaks of an arrest when the issue is the unlawful detention of Respondent. When it states the issue (Pet. at 7-8) it uses the word "arrest" or "arrested" ten times in a single paragraph. In that paragraph the Government uses the example of Respondent being arrested alone not giving rise to tainted testimony, and, conversely, the arrest of the passengers alone not giving rise to a right to suppress their testimony. The example is good, but it is not this case. The police had no grounds to detain Respondent, and yet they did

so unlawfully, in order to question the passengers.

The Court of Appeals did use the term "arrest" in referring to the violation of Respondent's rights. The government seizes on this to avoid the consequences of its concession below that the questioning of the passengers was a search to which Respondent had standing to object, and that if this search was illegal the testimony of these witnesses could be suppressed by a person having standing to object. (Pet. at 6, n.2) The Respondent was "seized" and his automobile was "seized" by the police in order to question the passengers to conduct a search of Respondent's automobile. This Court has rejected such semantic distinctions. In Terry v. Ohio, 392 U.S. 1, 16 (1968) this Court stated:

> "Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden 'seized' Terry and whether and when he conducted a 'search'. There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the stationhouse and prosecution for crime -- 'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person . . . ." [Footnote omitted]

And in Davis v. Mississippi, 394 U.S. 721, 726-727 (1969) similar semantic distinctions were also rejected:

> "It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject

> unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions." We made this explicit only last Term in Terry v. Ohio, 392 U.S. 1, 19 (1968), when we rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search." [Footnote omitted]

The District Court opinion fixes the time of the Fourth Amendment intrusion. The Trial Judge found that after the police had determined that the car was not stolen, that it was owned locally and that Respondent had a valid driver's license, they were unjustified in holding the car and its occupants any longer. The police testified, however, that Respondent was not free to leave, and that he would have been pursued and recaptured if he tried to drive away. The District Court found that Respondent had been "arrested" at the time his driver's license was returned and immediately before the interrogation of his passengers was begun.

In addition, the Government has alluded to the fact that "the officers did not enter the car, the passengers were in plain view, and Respondent had no property right or other legally protected interest in their continued presence in the car". (Pet. at 6, n. 1). This type of argument is reminiscent of the one rejected in Katz v. United States, 389 U. S. 347 (1967).

> "The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been had he remained outside. But what he sought to exclude when he entered the booth was not the intruding eye -- it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. . . ." 389 U.S. at 353.

Respondent does not contest the fact that the passengers were in "plain view". Naturally they could be seen, but at best all that could be seen was that the passengers were of Latin descent, and there is not even testimony in the record to support the view that the officers could observe the racial characteristics of the car's occupants. The officers could not learn by simple observation that they were aliens unlawfully within the United, their last previous entry into the United States having been within the past three years. This could only be learned by interrogation, and any reasonable suspicion that this was the case could have arisen only after the rights of Sanchez were violated by the police detention of him for the interrogation of these men.

In short, Respondent did have a legally protected interest -- the right not to be subject to unlawful detention and search.[3]

At no point in these proceedings has Respondent attempted to assert the right of the alleged Mexican aliens discovered in his automobile, and any suggestion to the contrary by the Government is a misinterpretation of the decisions of two courts. Respondent's position has always been that

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3 The decision below is also in accord with the decisions of this Court. Henry v. United States, 361 U.S. 98 (1959), involved a Motion to Suppress Evidence obtained as a result of an unlawful search and seizure. There, the FBI, acting on information which was not on the record, waved the defendants' car to a stop. The Government conceded, and this Court agreed, that the arrest took place when the FBI agents stopped the car.

> "...when the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case was complete. . . ." 361 U.S. at 103.

See also Terry v. Ohio, 392 U.S. 1 (1968); United States v. Nicholas, 448 F. 2d 622 (8th Cir. 1971).

after his driver's license was returned to him, the police had no right to detain him and his automobile any longer. Interrogation of the passengers in Respondent's automobile, for which the Respondent was detained ("arrested" if you will), constituted a violation of the rights guaranteed to him under the Fourth Amendment to the Constitution of the United States. The government has conceded that the interrogation of the passengers in Respondent's automobile constituted a search of the car to which he has standing to object. They have also conceded that the testimony of a witness discovered during the course of an illegal search can be suppressed. (Petition at 6, n. 1) The only issue was the legality of police conduct. The opinion of the Court of Appeals, when read in conjunction with that of the District Court, has upheld the contention of the Respondent. The police did not have the slightest grounds to suspect that they were aliens unlawfully within the United States until they were unable to produce identification. This information was obtained as a direct result of Respondent's unlawful detention. In short, the Respondent could not be less concerned with any violation of the rights of the passengers in his automobile -- their testimony and their physical presence is evidence against him and was obtained by virtue of an unlawful detention of him and his automobile, and it is this evidence against him which has been ordered suppressed.

Accordingly, the question presented for review and the government's argument are irrelevant to the opinion below. This Court should not consider questions not decided in the courts below. See, United States v. Fleischman, 339 U. S. 349, 365 (1950) and Owens v. Union Pacific R. Co., 319 U. S. 715, 724-725 (1943), where this Court refused to entertain questions not decided in the lower courts. The Government asserts that the decision of the Court of Appeals presents

an important question of Federal law which was decided contrary to the decisions of this Court, and that there is now a conflict among the circuits. This is simply not the case. The Respondent has not challenged the arrest of the passengers. He clearly has standing to assert the violation of his own rights, and the cases cited by the government do not conflict with the decisions of the courts below.

Alderman v. United States, 394 U.S. 165 (1969) held that the Fourth Amendment rights of the petitioner were not violated by government electronic eavesdropping on premises which were not theirs, of conversations to which they were not a party. Here, Respondent and his vehicle were detained by the Villa Park Police, and as a direct result the police acquired information which led them to suspect that the passengers were aliens illegally within the United States. Nor are Jones. v. United States, 362 U.S. 257 (1960) or Simmons v. United States, 390 U.S. 377 (1968), in point. Both cases have language to the effect that Fourth Amendment rights are personal, a proposition with which the Respondent, the District Court and the Court of Appeals agree.

In Brown v. United States, 411 U.S. 223 (1973), the defendants were charged with transporting, and conspiracy to transport, stolen goods in interstate commerce. On the basis of defective warrants, the police searched a warehouse where they had seen the defendants place goods. The defendants alleged no possessory interest in the warehouse or the goods seized, and were not on the premises at the time of the search. Possession was not a central element of the offense. This Court held that the petitioners in Brown had no standing to assert the rights of the owner of the warehouse. Respondent here owned the vehicle detained and was himself detained, and asserts the rights of no one but himself.

Similarly, the other cases cited by the government in support of the proposition that this case was decided contrary to the decisions of this court and that an important question of Federal law is here involved are irrelevant.

The government also asserts that the decision in this case conflicts with the decisions of other circuits. Rather than being in conflict, the decision is in complete harmony with those of other circuits which have ruled on the point, and with many state court decisions.

United States v. Humphrey, 409 F. 2d 1055 (10th Cir. 1969) is relied upon heavily by the government in suggesting a conflict among the circuits. In that case, Humphrey was a passenger in an automobile driven by Emery. There had been a traffic violation, and the police officers stopped Emery's vehicle, ordered him out and searched his person. As a result of evidence found on Emery's person, the vehicle was searched and evidence was found which incriminated the defendant. There is no indication that the defendant complained of his own detention during the search of Emery. Although the court held that the initial search of Emery was unreasonable and, therefore, invalid, its results made the search of the vehicle reasonable and Humphrey was held to be without standing to complain. Humphrey's rights were never violated, as were those of Respondent here.

The Government's Petition is predicated on an alleged conflict in the Circuits which has been demonstrated to be a conflict that does not exist in the opinions below, but which was manufactured by the Government. Moreover, even if the Government's interpretation of the Seventh Circuit's opinion is correct, there is still hardly a conflict among the Circuits worthy of this Court's consideration. The Seventh Circuit has not pretended to give Respondent third-party standing or to depart from the accepted law in this regard. The best the Government has been able to state is that "inherent in the court

of appeals' affirmance of the suppression order, therefore, is a determination that Respondent may be permitted to obtain exclusion of evidence derived from the arrest of his passengers". (Pet. at 8). Thus, to find a conflict among the Circuits, the government must search for one that is inherent, rather than point out one that is explicit. Furthermore, previous decisions of the circuit indicate that it is well aware of the requirement for standing. [United States v. Chaidez-Castro, 430 F. 2d 766 (7th Cir. 1970); United States v. Preston, 463 F. 2d 544 (7th Cir. 1972)], and it is obvious that the Seventh Circuit in the future will follow the teachings of Alderman and Brown, and require an invasion of defendants' rights before suppressing evidence offered against them.

Being generous to the Government's attempts to make this case something it is not, we have, at best, a conflict within the Seventh Circuit, and not among the circuits.[4]

In addition to the foregoing reasons, the Respondent wishes to assert another reason for denying the writ. The unlawful search took place over two years ago. The indictment was filed on February 1, 1972, and, as previously noted, the District Court granted Respondent's Motion to Suppress Evidence on June 8, 1972. The Government filed its Notice of Appeal on June 23, 1972, and on July 30, 1972 and August 30, 1972, the Government applied for and received thirty day extensions of time to docket its appeal.

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[4] In a gratuitous Footnote (Pet. at 11) the Government criticizes the exclusion of the live testimony of a witness discovered in the course of a Fourth Amendment intrusion. Since that issue is not before this Court, Respondent will only note in passing the overwhelming authority in support of the proposition. United States v. Tane, 329 F. 2d 848 (2d Cir. 1964); Smith v. United States, 344 F. 2 545 (D.C. Cir. 1965); Williams v. United States, 382 F. 2d 48 (5th Cir. 1967); United States v. Marder, 474 F. 2d 1192 (5th Cir. 1973); United States v. Resnick, 483 F. 2d 354 (5th Cir. 1973); People v. Albea, 2 Ill. 2d 317, 118 N.E. 2d 277 (1954); Abbot v. United States, 138 A. 2d 485 (D.C. Mun. Ct. App. 1958); People v. Mickelson, 49 Cal. 2d 448, 30 Cal. Rptr. 18, 380 P. 2d 658 (1963); State v. Rogers, 27 Ohio Op. 2d 105, 198 N.E. 2d 796 (C.P. 1963); Commonwealth v. Cephas, 447 Pa. 500, 291 A. 2d 106 (1972); Nicholas v. State, 14 Cr. L. 2084 (Tex. Ct. Crim. App. Sept. 25, 1973).

On December 27, 1972 the Court of Appeals, on motion of the government, granted an extension of time to file reply briefs. After the Court of Appeals filed its decision, the government was granted an additional thirty days to file their Petition for Rehearing. The government has also applied for and received an extension of time from this Court to file its Petition for a Writ of Certiorari. (Admittedly, Respondent has also has been granted a few continuances.)

On October 31, 1972 Respondent filed its assertion of a speedy trial right in the District Court, and on October 11, 1973, after the mandate of the Court of Appeals issued, Respondent filed a Motion to Dismiss because of denial of a speedy trial, and a Motion for Immediate Setting of a Date for Trial. The District Court has not ruled on these Motions, but they will be asserted by Respondent on remand.

The government took this appeal under the provisions of 18 U.S.C. §3731, which provides in part that:

> "The appeal in all such cases shall be taken within thirty (30) days after the decision, judgment or order has been rendered and shall be diligently prosecuted." [Emphasis added]

These extensions of time hardly indicate diligent prosecution, and if this Court should grant the writ, it may well be another year before this case is remanded to the District Court for trial or other disposition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Joseph Beeler

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January, 1974

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-820

UNITED STATES OF AMERICA, PETITIONER

V.

PASCUAL GUANA-SANCHEZ

AFFIDAVIT OF SERVICE

COMMONWEALTH OF PENNSYLVANIA:

SS.

COUNTY OF MONTGOMERY:

DONALD J. MARTIN, an attorney for the respondent, certifies pursuant to Rule 33(2)(a) of the Rules of the Supreme Court of the United States that all parties required to be served have been served and specifically that he mailed one copy of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari to all counsel of record on January 23, 1974 by placing said copy in an airmail postage prepaid envelope and by depositing such envelope in a United States Postal Service Mailbox at the Norristown, Pennsylvania Post Office, said envelope being addressed as follows:

Hon. Robert H. Bork
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Donald J. Martin

Sworn to and subscribed
before me this day
of January A.D., 1974.

Notary Public

ANNE W. POWELL, Notary Public
Norristown Boro, Montgomery Co., Pa.
My Commission Expires March 24, 1977